Supreme Court, U.S.
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No. 85-110

In The
Supreme Court of the United States
October Term, 1985

GEORGE A BINT,

Appellant,

v.

CREATIVE FOREST PRODUCTS, EMPLOYER, AND MARYLAND CASUALTY COMPANY, SURETY,

Appellees.

EDWIN W. DALTON,

Appellant,

v.

CREATIVE FOREST PRODUCTS, EMPLOYER, MARYLAND CASUALTY COMPANY, SURETY, AND STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

SUPPLEMENTAL MOTION TO DISMISS

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QUESTIONS PRESENTED BY APPELLANTS AND SUMMARY OF ARGUMENTS THAT SUCH QUESTIONS DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS

APPELLANTS have set forth their questions on appeal, as follows:

> 1. Does the sixty (60) day exposure requirement for nonacute occupational diseases under Idaho Code Section 72-439 create unreasonable classifications which violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
>
> 2. Does the sixty (60) day exposure requirement for occupational diseases under Idaho Code Section 72-439 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by establishing an irrebuttable presumption?

Appellee respectfully submits that neither issue set forth by appellants presents itself as a substantial federal question.

PARTIES

All the parties to this proceeding are listed in the caption of this case.

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I.

OFFICIAL REPORTS AND OPINIONS

Inasmuch as the Idaho Supreme Court's decisions have not been published in the official reports, copies of the slip opinions in these cases dated January 29, 1985, and April 11, 1985, are attached in the Appendix to Appellants' Jurisdictional Statement.

———o———

II.

RELEVANT STATUTE

Appellants challenge Idaho Code Section 72-439 in part, as follows:

> An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.

———o———

III.

STATEMENT OF THE CASE

Appellee, State of Idaho, Industrial Special Indemnity Fund (hereinafter, Fund) specifically incorporates by reference the Statement of the Case as set forth in the *Motion to Dismiss* submitted by Appellees, Creative Forest Products and Maryland Casualty Company, dated July 25, 1985.

IV.

REASONS FOR DISMISSING APPELLANTS' APPEAL ON THE GROUND THAT APPELLANTS HAVE NOT SET FORTH A SUBSTANTIAL FEDERAL QUESTION

Appellee, Fund, believes that the *Motion to Dismiss* submitted by Appellees, Creative Forest Products and Maryland Casualty Company, has presented a correct and clear analysis of the fact and law brought forth on this appeal. Therefore, the fact and law analyzed by Appellees, Creative Forest Products and Maryland Casualty Company, in their *Motion to Dismiss* dated July 24, 1985, is hereby incorporated by reference into this *Motion to Dismiss* presented by the Fund.

V.

THE NATURE OF THE INDUSTRIAL SPECIAL INDEMNITY FUND IN IDAHO

The following overview is provided to further assist the Court in understanding the correct nature and function of the Fund. Prior to its creation, an employer who hired a handicapped worker was subject to the responsibility of paying for total permanent disability compensation to an employee who was rendered totally and permanently disabled because of a pre-existing handicap coupled with a subsequent industrial injury. See, *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921). Idaho Code Section 72-323 authorized the creation of the Fund to relieve employers of this burden. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931, 934 (1968). Thus, the ultimate goal in creating the Fund was to encourage employers to hire par-

tially incapacitated persons and to encourage partially incapacitated workers to seek employment. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696, 700 (1981); 11 W. Schneider, Workmen's Compensation § 2304 (1957).

The funds are derived from payments made by employers and their sureties. Idaho Code Section 72-323 and Section 72-327. It is administered by a manager whose office is a part of the State of Idaho, Department of Administration. Idaho Code Section 72-324. The State Treasurer is the custodian of the money received and the funds collected are placed in a designated account with payments being made in accordance with directions from the manager of the Fund. Idaho Code Sections 72-325, 72-333 and 72-326.

In addition to establishing a plan to administer the Fund, the Idaho Legislature enacted Code Section 72-332 to control the Fund's liability, which section is quoted as follows:

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of

his compensation benefits out of the industrial special indemnity account.

(2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

An explanation of Idaho Code Section 72-332 as it operates in attaching liability to an employer, surety or the Fund was advanced by the Supreme Court of Idaho in *Lyons v. Industrial Special Indemnity Fund,* 98 Idaho 403, 565 P.2d 1360, 1361 (1977), as follows:

> By virtue of Idaho Code Section 72-332 the Fund can become liable for compensation benefits whenever an employee with an existing permanent physical impairment becomes totally and permanently disabled due to an injury arising out of and in the course of his employment. The total and permanent disability must be the result either of the combined effects of the pre-existing impairment and the subsequent injury, or of the aggravation and acceleration of the pre-existing impairment by the subsequent injury. In such cases, the employer and its surety are liable for compensation benefits only for the disability caused by the subsequent and last injury. The Fund pays the remainder of the benefits to which the employee is entitled by reason of his total and permanent disability.

> If facts are established to impose liability upon the Fund, payment of workers compensation benefits are apportioned between the employer/surety and the Fund.

The above-quoted explanation of Idaho Code Section 72-332 leaves no room to doubt that the primary responsibility for payments awarded to an employee for a disability caused by a subsequent and last injury falls directly on the employer-surety and not the Fund. *Lyons,* 565 P.2d at 1361 (1977); see also, *McDonald v. Treasurer of State of Idaho,* 52 Idaho 535, 16 P.2d 988 (1932). 101 C.J.S. *Workmen's Compensation* §§ 836-848 (1958). The Fund is responsible for paying the injured workman those benefits for total permanent disability which are not required to be paid by the employer and its surety. *Carey, v. Clearwater County Road Department,* 107 Idaho 109, 686 P.2d 54 (1984).

As readily perceived by the foregoing overview, the Fund is not, and never has been a state operated entitlement program which provides to all injured employees. Rather, it operates and functions, in essence, as a reinsurer of an employer-surety to protect against a catastrophic loss precipitated by a pre-existing condition which is aggravated and accelerated by or combines with a subsequent industrial accident. The Fund was established, as promulgated by Idaho Legislators, in order to assist and encourage employers in the area of social and economic development. Therefore, whatever assistance is provided to an employee by the Fund is granted according to statutory qualifications and restrictions, which statutes are upheld and supported by the Constitution of the United States.

VI.
CONCLUSION

Respondents respectfully move that the United States Supreme Court dismiss Appellant's appeal inasmuch as no substantial federal question is at issue.

DATED This 24 day of September, 1985.

Respectfully submitted,

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By /s/ PAUL S. PENLAND
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